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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,
Petitioner,

vs.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petitioner Ets-Hokin & Galvan, Inc., now by change of name Ets-Hokin Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 11, 1967.

I.

OPINIONS BELOW

The opinion of the Court of Appeals does not yet appear in the Federal Reporter and is reproduced herein as Ap-

pendix A. The unreported opinion of the District Court is reproduced herein as Appendix B.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1967, and this appeal is therefore timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

May a common carrier who has failed to file its tariff rates with the Interstate Commerce Commission in violation of the Interstate Commerce Act collect freight charges from a shipper pursuant to an oral agreement for an interstate haul?

IV.

STATUTES INVOLVED

Because the statutes involved in this case are lengthy, they are set forth in abbreviated form below and verbatim in Appendix C. These statutes are:

(1) 49 U.S.C. §317(a):

> "(a) Every common carrier by motor vehicle shall file with the Commission . . . tariffs showing all rates, fares, and charges for transportation . . . of . . . property in interstate . . . commerce . . . . [T]he Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful."

(2) 49 U.S.C. § 317(b):

> "(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith . . . than the rates,

fares, and charges specified in the tariffs in effect at the time . . . ."

(3) 49 U.S.C. § 317(d):

"(d) No common carrier by motor vehicle . . . shall engage in the transportation of . . . property unless the rates, fares, and charges upon which the same are transported . . . have been filed and published in accordance with the provisions of this chapter."

V.

STATEMENT OF THE CASE

This is a diversity case. This action was originally commenced by respondent, Maas Transport, Inc. hereinafter sometimes called "Maas", in the District Court, Fifth Judicial District, State of North Dakota, and was removed by petitioner, Ets-Hokin & Galvan, Inc., hereinafter sometimes called "Ets-Hokin", to the United States District Court for the District of North Dakota, Northwestern Division. The action was removed on the basis of diversity of citizenship and amount in controversy. Maas is a North Dakota corporation having its principal place of business in the State of North Dakota. Ets-Hokin is a California corporation having its principal place of business in the State of California.

Ets-Hokin is engaged in the contracting and engineering business. Maas is a common carrier by motor vehicle.

In May, 1962, Ets-Hokin contracted with the United States Air Force to install about 1,500 miles of buried cable in the Minot, North Dakota, missile complex. The reels of cable were shipped in interstate commerce by rail from Bonham, Texas, to certain Soo Line railheads near Minot, North Dakota. Pursuant to an agreement between Ets-Hokin and Maas, the reels were picked up by Maas at the railheads and transported to specifically designated

field locations intermediate to the missile site control centers.

On August 6, 1962, Maas filed with the Interstate Commerce Commission, hereinafter sometimes called "ICC", an application for permanent authority to operate as a common carrier, by motor vehicle, over irregular routes, to transport the cable in question (1) between the Soo Line railheads on the one hand and intercontinental ballistic missile launching sites on the other and (2) between the various missile sites. On August 31, 1962, while Maas' application was still pending, before any authority to operate had been obtained and before any tariff rate had been filed with the ICC, Maas commenced hauling the cable. Maas continued to haul the cable without authority or applicable tariffs on file with the ICC until its services were terminated by Ets-Hokin on March 5, 1963.[1]

Maas brought this suit to recover freight charges for the cargo so hauled in violation of the Interstate Commerce Act.[2]

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1. The Court of Appeals observed in footnote 3 of its opinion that a temporary interstate tariff became effective on November 18, 1962, but did not consider the question of whether that temporary tariff covered the hauling in question. It did not. The Interstate Commerce Commission specifically so held in a related case, *Maas Transport Inc., Extension-North Dakota Missile Sites,* 92 M.C.C. 581 (Sept. 17, 1963) and pointed out that the temporary authority and tariff covered only hauls from the railheads to missile sites, while the hauling in question was from railheads to points *intermediate* to the missile sites. The Court of Appeals also noted that "[t]he trial court found that Maas did not, 'at the critical time, have or rely on any applicable interstate tariff.'"

2. B. L. Lawrence, doing business as Lawrence Transport, intervened as a party plaintiff. Maas and Lawrence stipulated that any judgment rendered could be rendered in their favor jointly.

The District Court found that the parties had entered into an express oral contract providing for compensation in accordance with hourly rates set forth in Maas' inapplicable *intrastate* tariff on file with the Public Service Commission of North Dakota. The District Court further found that the shipments were in interstate commerce and that respondent did not have or rely on any applicable *interstate* tariff, but concluded that the contract was valid and enforceable notwithstanding the violation of the Act. The Court entered judgment for the full amount prayed for in the complaint, $90,990.75, together with interest.

An appeal was taken by Ets-Hokin to the United States Court of Appeals for the Eighth Circuit. Ets-Hokin argued, *inter alia,* that the oral contract of carriage was illegal as being in violation of Part II of the Interstate Commerce Act, Motor Carriers, 49 U.S.C. 301 et seq., because no tariffs had been filed. The Court of Appeals responded by stating:

> "In the instant case, Maas was in violation of the Motor Carrier provisions of the Interstate Commerce Act when it transported cable under its contract with Ets-Hokin and was subject to penalties for such violations. The cable transportation contract itself, however, would be void, illegal or unenforceable only if Congress, in passing the Motor Carrier provisions of the Interstate Commerce Act, intended that contracts resulting in violations of that portion of the Act be illegal and void. A review of the statutory provisions involved herein reveals no congressional intention to make contracts in violation thereof void or illegal. (footnote omitted) The contract between Ets-Hokin and Maas was valid and enforceable."

VI.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Eighth Circuit Upholding the Enforceability of a Contract Made in Violation of the Interstate Commerce Act Is in Conflict With Principles of Law Announced by This Court.

A. CONTRACTS IN VIOLATION OF THE INTERSTATE COMMERCE ACT.

While there are no cases decided by this Court involving the validity of a contract to transport goods in interstate commerce where, as here, the carrier filed no tariff rate with the ICC whatsoever, several closely analagous cases decided by this Court brand as illegal and unenforceable deviations from tariff rates on file with the ICC.

In *Atchison, T. & S.F. Ry. v. Robinson,* 233 U.S. 173 (1914), an oral agreement which did not conform to the railroad's filed tariffs was held illegal and unenforceable. The Court stated at 233 U.S. 181:

> "To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, . . . would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. . . . To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this Court, which are to require equal treatment of all shippers and the charging of but one rate to all and that the one filed as required by the Act."

In *Chicago & A. R.R. v. Kirby,* 225 U.S. 155 (1911), the railroad had entered into a contract at rates different from those published. This Court held that the contract

was unenforceable because to allow the shipper to recover thereunder would in effect give him a preferential rate, in violation of the Act. The Court relied on Section 6(7) of the Act, applicable to railroad carriers, which is identical to Section 317(b) of the Act, applicable to motor carriers.

In *Pittsburgh, C., C. & St.L. Ry. v. Fink,* 250 U.S. 578 (1919), the suit was to recover a freight undercharge resulting from an agreed-upon rate inadvertently different from the one filed with the ICC. This Court held the contract to be unlawful and unenforceable, even though there was no attempt to evade the Act.

B. ILLEGAL CONTRACTS IN GENERAL

The most recent opinion by this Court involving the enforceability of contracts in violation of federal statutes is *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520 (1961), wherein it was held that a contract in violation of 18 U.S.C. § 434 (conflict of interest) is unenforceable. At page 563 the Court held:

> "Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in section 434. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced

> to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred."

The reasoning of the Court in the above case applies equally to the present situation. If, as the Eighth Circuit suggests, the sole sanction for the illegal contract is that Maas would be "subject to penalties for such violation", then shippers like Ets-Hokin would be "forced to bear the burden of complying with the very sort of contract which the statute sought to prevent."

See also *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926); *Miller v. Ammon*, 145 U.S. 421 (1892); and *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396 (1889).

2. The Decision of the Eighth Circuit That a Contract Made in Violation of the Act Is Nevertheless Valid and Enforceable Is in Conflict With General Principles of Law Enunciated by Other Circuit Courts.

There are no Court of Appeals cases dealing with the question of the validity of a contract to transport goods in interstate commerce where the carrier has no rate on file with the ICC. There are, however, several cases in other Circuits which hold that a contract made in violation of the Act is illegal and void. *Interstate Commerce Commission v. North Pier Terminal Co.*, 164 F.2d 640 (7th Cir. 1947), cert. den. 334 U.S. 815 (1948); *Interstate Commerce Commission v. Keeshin Motor Express Co.*, 134 F.2d 228 (7th Cir. 1943); *Central R.R. of New Jersey v. United States Pipe Line Co.*, 1 F.2d 866 (3rd Cir. 1924).

In *Central R.R. of New Jersey v. United States Pipe Line Co., supra*, the trial court found that:

". . . '[T]he contract sued upon is illegal and void because it violates the Interstate Commerce Act . . . in that the agreed toll for which the oil was to be transported was lower than the tariff rates posted by the plaintiff.'" (1 F.2d at 868.)

The Circuit Court of Appeals, finding noncompliance with the Act, affirmed at p. 868:

"The purpose of the Act in requiring tariffs containing the rate of carriers to be filed was to secure uniformity, to secure the same treatment to all shippers alike by requiring them to pay one rate as established, published and posted. To do this requires inflexibility in the enforcement of the act. (citations) The contract rates differing from the published rates filed with the Interstate Commerce Commission, rendered the contract *illegal* and *void.* (citations)" [emphasis added]

and at p. 870:

"The plaintiff in the case at bar based his suit upon the contract. The right to recovery depends upon its validity, and its validity in turn depends upon compliance by the carrier with the provisions of the Interstate Commerce Act. . . . It is public policy and the law that all shippers be treated alike and pay the same rates. Therefore this court cannot sanction the transportation of oil by the plaintiff for the defendant at illegal rates."

3. The Decision of the Eighth Circuit Is in Conflict with the Decisions of the Highest State Courts of Several States on the Broad Federal Question Here Involved.

The state courts have consistently held that acts or contracts in violation of the Interstate Commerce Act are unlawful and void.

Bankers & Shippers Ins. Co. v. Blackwell, 51 So.2d 498 (Ala. 1951) concerned a suit by an interstate motor common

carrier for recovery under an insurance policy for damage to goods while in transit. The carrier was engaged in interstate commerce and had not secured a permit or certificate; the court held that the hauling was illegal and in violation of the Interstate Commerce Act constituting criminal offenses in violation of the laws of the United States, and thus the contract was illegal and unenforceable and null and void.

In *St. Louis-S.F. Ry v. J. W. Meyers Comm'n Co.*, 208 Ark. 1032, 185 S.W.2d 288 (1945), the shipper attempted to violate the terms of the railroad tariff by proving an express oral contract with the railroad covering goods shipped in interstate commerce. The court held that any special contract not authorized by the Act and not available to all shippers alike is void.

Shirks Motor Exp. Corp. v. Forster Transfer and Rigging Co., 214 Md. 18, 133 A.2d 59 (1957) likewise held a contract in violation of the Act void. Other cases to the same effect are *Thompson v. Richards*, 158 Kan. 178, 146 P.2d 359 (1944); *Bass v. Chicago Duluth & Georgian Bay Transit Co.*, 399 Ill. App. 246, 89 N.E.2d 430 (1949); *Brandon v. Lichty*, 133 Fla. 520, 182 So. 897 (1938), and *Pennsylvania R.R. v. Cameron*, 280 Pa. 458, 124 A. 638 (1924).

4. The Exact Question Here Involved, Not Yet Ruled Upon by This Court, Is of Vital Interest to the Effective Regulation of Interstate Commerce and Should Be Decided by This Court.

This Court has ruled that a contract for rates deviating from a filed tariff is illegal and unenforceable. The question here presented for review is whether a contract is also illegal and unenforceable where no rates at all have been filed. Petitioner submits that this question must be resolved for the following reasons:

(a) The Eighth Circuit's opinion has resulted in the anomalous situation wherein a carrier who completely ignores the Interstate Commerce Act is in a better position than a carrier who merely deviates from its tariffs. It is submitted that such a result is in direct conflict with the National Transportation Policy, printed herein as Appendix D, which underlies the Act in that this result would allow the carrier to engage in unjust discriminations, undue preference and advantages, and unfair and destructive business practices.

(b) The decision of the Eighth Circuit destroys the effectiveness of the Interstate Commerce Act in regulating interstate motor carriers. If the Eighth Circuit is correct in upholding the validity of a contract made in direct violation of 49 U.S.C. § 317(d), there would be no effective sanctions to induce carriers to submit to the regulations of the ICC. The decision below would encourage unscrupulous motor carriers to violate the Act, thereby placing a heavy burden on the ICC to prosecute all offenders.

VII.
CONCLUSION

For the reasons hereinabove stated petitioner respectfully submits that this writ should be granted.

Dated: San Francisco, California, September 28, 1967.

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(Appendices Follow)

Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 18,628

Appeal from the United States District Court for the District of North Dakota.

Ets-Hokin & Galvan, Inc.,
Appellant,

vs.

Maas Transport, Inc., and B. L. Lawrence, d/b/a Lawrence Transportation,
Appellees.

[July 11, 1967.]

Before MEHAFFY and GIBSON, Circuit Judges and STEPHENSON, District Judge.

STEPHENSON, District Judge.

This action was instituted by Maas Transport, Inc. (Maas) against Ets-Hokin & Galvan, Inc. (Ets-Hokin) for transportation charges of $90,990.75 arising from services rendered by Maas from August 31, 1962 to March 5, 1963. B. L. Lawrence, d/b/a Lawrence Transportation (Lawrence) subsequently intervened in the lawsuit as a party plaintiff and joined Maas in seeking compensation of $90,990.75.[1] Jurisdiction exists by diversity of citizenship and involvement of the requisite jurisdictional amount. 28 U.S.C. § 1332. After a non-jury trial in the district

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1. Maas and Lawrence stipulated in the trial court that any judgment to be entered in this matter may and should be entered in their favor jointly.